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OFFICE OF GENERAL COUNSEL

April 5, 2013

**CONFIDENTIAL**

*Via Hand Delivery*

Jeff Jordan, Supervisory Attorney, CELA  
Office of the General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: Matter Under Review 6651

Dear Mr. Jordan:

**Introduction**

This is in response to the complaint filed in the above-referenced matter by a Brian Rothenberg on behalf of an organization called Progress Ohio. Mr. Rothenberg states the complaint against Murray Energy Corporation is based "on information and belief," but then makes clear that his only sources are: a *WWAV* radio interview where the hostile talk show host does not name any person making claims; a *Los Angeles Times* website story that does not name any complaining witness; and two *Cleveland Plain Dealer* website stories that do not name any complaining witness. Thus, without any personal knowledge, and without any demonstration of the identity or reliability of claimed sources, the complainant herein has attempted to launch a government proceeding against Murray Energy Corporation. The Commission could and should reject the complaint on this basis alone. Putting a respondent to the burden and expense of answering such "ghost" charges leads to an unbalanced and unfair process where no real pleading standards exist.

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Relying on anonymous hearsay, the complainant falsely asserts that coal miner employees of Murray Energy Corporation were required to attend a candidate appearance event at a Beallsville, Ohio coal mining facility on August 14, 2012. The complainant acknowledges that these miners were not paid for their time at the event, yet oddly asserts that, nonetheless, resulting "images of minors" in the candidate's campaign ads afterward are something of value ostensibly attributable to Murray Energy Corporation. The complainant's insinuation that some sort of impermissible in-kind contribution by Murray Energy Corporation took place should be promptly dismissed by the Commission.

As will be demonstrated, although coal miner employees of American Energy Corporation (the subsidiary of Murray Energy Corporation that runs the Century Mine at Beallsville) were invited to the appearance of Governor Romney, there was no coercion involved. The communications to these non-management employees about the planned event were in the context of how important it was to save the coal industry and fight Obama Administration policies. There was no requirement that employees attend the candidate appearance; there was no tracking by management of employees who chose not to attend; and there certainly was no effort to discriminate against or punish the latter regarding their jobs or compensation. Thus, there is no basis for concluding that the employees were anything other than volunteers who wanted to turn out for an exciting, fun, and meaningful event—perhaps a once-in-a-lifetime opportunity to meet a presidential candidate.

Murray Energy Corporation and American Energy Corporation officials made arrangements with the Romney campaign to have the campaign committee pay for identifiable expenses related to the event. Thus, for example, costs for transporting workers and their guests from parking lots, as well as food, refreshment, entertainment, and other event expenses, were billed to and paid by the Romney campaign.

The fact that the Romney campaign chose to film the event and later incorporate some snippets in a campaign commercial is of no legal consequence. The FEC cannot suddenly assert that an employer of volunteers who attend a candidate's campaign event is somehow making a campaign contribution because of the intangible value of "images" to the campaign involved. That radical concept has never been the state of the law, and it never should be.

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### Factual Background

According to Mr. Ryan Murray (Vice President for Operations, Murray Energy Corporation), the planning for the August 14<sup>th</sup> event began after an informal suggestion from the Romney campaign.<sup>1</sup> Murray Energy Corporation and American Energy Corporation managers essentially worked out the logistics thereafter, with occasional interaction with the Romney campaign or the Secret Service about how the candidate's entourage would get to and from the event and how persons attending would be controlled for security purposes.

To make the event an enjoyable occasion for attendees, the planners decided to encourage workers to invite family members, and arranged food, refreshment, and entertainment (jugglers/acrobats). It was estimated that hundreds of miners might wish to attend, and safety concerns led to the decision that the midnight shift (which normally works from midnight until 10:00 am, including transport time in and out of the mine) should not work the day of the event (to allow them to get sufficient rest, attend the event, and then work their next shift safely). It was decided that the day shift (which normally works from 8:00 am until 6:00 pm, including transport time) would start early at 6:00 am on August 14, but finish (out of the mine) at 11:00 am. Non-management mine workers (paid hourly) do not get compensation for time not working, so the mine workers who attended the event did so "off the clock" in a volunteer capacity. The event was finished in time for workers starting the afternoon shift at 4:00 pm to begin work on time.

Invitations to the event were extended to the mine workers verbally by Kevin R. Hughes, Vice President and General Manager/Superintendent of American Energy Corporation's Century Mine. In the normal shift change meetings, starting on August 9 and throughout that weekend, he explained that an August 14 Romney campaign appearance would be held at the Century Mine in the 12:00 noon to 3:30 pm time frame, that employees were invited, that they could bring their family members, and that the mine operation would be closed down for the midnight shift and adjusted to 6:00 am to 11:00 am for the day shift.

Mr. Hughes recalls expressing in these meetings the importance of the upcoming election to the coal industry and discussing certain quotes attributed to President Obama and Vice President Biden suggesting opposition to particular coal industry practices and policies. Though he does not recall the specific words he used, he is aware of the assertion in this matter that he used the word "mandatory." He acknowledges that he may have used that word, but firmly believes it was used only in a context to convey that opposing the Obama Administration policies was

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<sup>1</sup> The factual recitations in this response are based on Declarations Under Penalty of Perjury provided by Mr. Kevin R. Hughes and Mr. Ryan Murray, attached as Exhibits 1 and 2, respectively.

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“mandatory” if the coal industry is to survive.<sup>2</sup> He recalls that several mine workers told him that they would not be able to attend, and all of them kept their other commitments without any questioning or opposition.

Mr. Hughes also recalls explaining in the meetings that a registration list was required to get a count of how many employees and family members would be attending (to plan bus transportation and food/refreshments) and to provide check-in capability on the day of the event (for security, crowd management, and bus logistics). He believes it is possible that someone might have misunderstood his use of the word “mandatory,” or might have misunderstood the purpose of the registration list, but is *certain* that he did not convey any direct or indirect threat of job action or financial reprisal for non-attendance. He also is certain that no employee in fact suffered any penalties or reprimands for not attending the event. He verifies that those workers whose midnight shifts were affected on August 14 were told by him that if they wanted another shift to replace their midnight shift, he would make that available. Indeed, that was a very viable option because workers have 91 days scheduled off each year, even before counting vacation, holiday, and personal days. Yet, according to Mr. Hughes, not a single employee requested to work a replacement shift. Mr. Hughes further clarifies that it is not unusual for a shift to miss its normal rotation when the mine has to be shut down for repairs, equipment installations, or similar reasons, and working a replacement shift sometime later is how mine workers typically even out their compensation over the long haul.<sup>3</sup>

<sup>2</sup> Mr. Rob Moore, Murray Energy Company Executive Vice President and Chief Financial Officer, indicated in a radio interview with talk show host David Bloomquist on or about August 27, 2012:

There were no workers that were forced to attend the event. We had managers that communicated to our workforce that the attendance at the Romney event was mandatory, but no one was forced to attend the event. . . . We had people that did not show up that day, and there were no consequences or repercussions taken against any employee that did not attend the Romney event.

A recording of this interview is available at <http://www.newsradio1170.com/player/?mid=22385072> (viewed 12/12/12). While the show host conducting the Moore interview was relatively hostile, the interview itself actually is very supportive of several points relevant to this response. What is significant regarding Mr. Moore’s use of the word “mandatory” is that it does not reflect a first person knowledge of what actually was said to employees by Mr. Hughes, and it was closely followed by the critical points that (1) no one in fact was forced to attend, and (2) there were no adverse consequences or repercussions for anyone who did not attend. He certainly did not indicate during the radio interview that there was any threat of job discrimination or financial reprisal.

<sup>3</sup> In his radio interview, *see* n. 2, Rob Moore reiterated this point, noting that closing the mine is not all that unusual. He noted the examples of storm damage and equipment malfunction, and indicated, “It’s not atypical to miss an eight hour day in this industry.” While Mr. Moore also indicated his view that the event “was in the best interest of anyone that’s related to the coal industry,” and opined, “To give up eight hours for a career, I just don’t believe that there is anything negative about that,” it is clear from Mr. Hughes that the midnight shift workers who attended the event were simply given a normal shift off and were expressly offered the option of working a replacement shift to even out their overall compensation.

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Mr. Murray was involved with the logistics for the Romney appearance—including the bus transportation requirements and the check-in process. He verifies that a registration list was created to help determine how many persons would be attending and to facilitate the check-in process, and he avers that the list absolutely was not used to determine which employees did not attend. He recalls that an alphabetized electronic list was created so that multiple copies of check-in sheets could be used when the crowds of attendees arrived to get on buses. The check-in process furthered the security interests of the Secret Service and provided a way to divide arrivals into alphabetical lines to speed the process of getting onto the 30 or so buses arranged for the long trip from parking lots to the mine site. Mr. Murray specifically recalls tossing the bulky lists into his truck after the event and throwing them away that same day.

The event itself was a happy occasion. Food, refreshment, and entertainment were provided. Ryan Murray estimates that approximately 2,200 people attended (when mine workers, their family members, certain management employees of Murray Energy Corporation and its related subsidiaries and their family members, and a few other invited guests like Senator Portman are added together). Hourly non-management employees voluntarily attending “off the clock” were treated to a political event where a putative presidential nominee was featured. It can be no surprise to the Commission that the vast majority of coal industry workers were supportive of Governor Romney in the presidential election, so the Commission should be even more willing to accept the fact that the attendees at the event were there because they wanted to be. Further, after the complaint in this matter was filed, two letters signed by hundreds of the mine workers who attended the Romney event were written to emphasize the voluntary nature of attending.<sup>4</sup> In sum, the complainant’s unfounded assertion that there was any coercion of employees to attend is completely unfounded.

### Legal Analysis

#### *1. The Commission should prevent abuse of the complaint process.*

The harsh, anonymously sourced allegation of forcing coal miners to attend the Romney rally, and the spurious assertion about video “images” of miners attending the event, come from a group that has made clear its partisan hostility toward the Romney campaign and the Republican Party in general. Blog posts on Progress Ohio’s website in October 2012 include titles such as: “Mitt Romney’s dangerous agenda for Ohio Women and their families”; “GOP Leaders Expose

<sup>4</sup> The letters, one to President Obama and one to the radio talk show host who had aired anonymously-sourced insinuations about the Romney event, were signed by over 300 mine workers who did attend the Romney event, and they state emphatically that they were not forced to attend. Copies of those letters are attached as Exhibit 3. The miners even held a press conference to emphasize their message. For a description of the press conference, see Neil W. McCabe, *Ohio Coal Miners Rally Against Obama’s ‘Absolute Lies,’* Human Events (Oct. 13, 2012, 05:25 pm), <http://www.humanevents.com/2012/10/13/ohio-coal-miners-rally-against-obamas-absolute-lies/>.

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Mitt Romney"; "The Real Cost of the Romney-Ryan Plan to Ohioans"; and "Ten Things You Should Know About Romney's Extreme Stance on Women's Rights."<sup>5</sup> On the evening before the November 6 election, it posted a blog entry titled "The Red States and the 47%" that said, "Dear Red States: We're ticked off at your Neanderthal attitudes and we've decided we're leaving..."<sup>6</sup>

It is clear that the complainant was hoping to simply achieve partisan gain by filing the complaint. The fact that the complainant was willing to file a complaint based only on anonymously sourced news stories only makes this more obvious.

As the Commission knows, the statute attempts to restrain the FEC from allowing the complaint process to be misused this way—hence the requirement at 2 U.S.C. § 437g(a)(1) that a complaint "shall be signed and sworn to by the person filing such complaint." Giving credence to alleged assertions of one or more anonymous persons mentioned in a news story simply because a listener/reader is willing to sign and file a "complaint" obviously creates an end-run around the intent of the complaint process.<sup>7</sup> Those anonymous sources have not signed or sworn to anything before the Commission. Further, where such anonymous sources are simply passed along by a partisan complainant, the Commission should be even more unwilling to assume any validity.

The anonymous sources, who may have been displeased about missing particular work hours or may not have shared the views of co-workers about President Obama and Governor Romney, have created a great deal of public controversy and negative mainstream press about Murray Energy Corporation and its founder Robert E. Murray. Filing this response has itself been a very costly imposition on the respondent. We strongly urge the Commission to be mindful of the damaging impact that can result from abuse of the FEC's complaint process.

2. *There is no reason to believe a violation occurred regarding the claim of "required" attendance by non-management mine workers.*

The facts provided in the Declarations Under Penalty of Perjury of the company officials with knowledge of the events in question demonstrate that there was no required attendance at all. Asking or even urging vigorously is not the same as requiring. Mr. Hughes is the company official who verbally conveyed the invitation to the Romney event, and he makes clear that in

<sup>5</sup> ProgressOhio Blog (Jan. 11, 2013), [progressohio.org/blog](http://progressohio.org/blog). These and other examples are attached as Exhibit 4.

<sup>6</sup> *Id.*

<sup>7</sup> As expressed by several commissioners in 2009: "Basing [a "reason to believe"] recommendation on information provided to a reporter by anonymous sources associated with a complainant, at a minimum, violates the spirit of this provision." MUR 6056 (Protect Colorado Jobs et al.) Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn (June 2, 2009), p. 11.

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fact mine workers were free to not attend and none who indicated they would not attend were subjected to any questioning or opposition. He further indicates that no workers were subjected to any penalties or reprimands for not attending the Romney event.

Mr. Hughes and Ryan Murray explain that although a registration list was created to gauge attendance, help with security, and facilitate check-in and bus transportation, that list was not used to track which employees did not attend. Indeed, Ryan Murray describes tossing the multiple check-in list copies in the trash the day of the event.

Those mine workers who missed work hours on August 14, the day of the event, were not compensated for that "off the clock" time. It is thus apparent that they were not in a "work" mode and were free to attend or not attend as they saw fit.<sup>8</sup> This is yet another factor suggesting no coercion existed.

3. *Even if there had been coercion, there is no coercion prohibition that reaches this situation.*

As the Commission recently demonstrated, there is no statutory or regulatory coercion proscription covering efforts to get employees to participate in candidate-related activities unrelated to fundraising.<sup>9</sup> The provisions of the statute that prevent coercion, at 2 U.S.C. § 441b(b)(3), only prevent coercion in the solicitation of contributions for a company PAC.<sup>10</sup>

<sup>8</sup> The company had a basic understanding that paying non-management hourly personnel while they attend a candidate campaign appearance could raise in-kind contribution questions. Rob Moore, in the radio interview referenced in n. 2, explained: "By law, federal election law, we could not pay people to attend the event." This concept stems from the Commission's regulations regarding candidate appearances. Compare 11 C.F.R. § 114.3(c)(2) (allowing a corporation to pay compensation costs of management personnel attending a candidate appearance before the management group and family members) with 11 C.F.R. § 114.4(b)(1) (prohibiting a corporation from paying the costs associated with a candidate appearance to the extent communications go beyond the management group to rank and file employees and their family members and involve express advocacy by a company representative).

<sup>9</sup> See MUR 6344 (United Public Workers, AFSCME Local 646, AFL-CIO) Statement of Reasons of Vice Chair Ellen L. Weintraub and Commissioners Cynthia L. Bauerly and Steven T. Walther (Aug. 7, 2012) and Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn II and Matthew S. Petersen (Aug. 21, 2012).

<sup>10</sup> "It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

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The regulatory provisions implementing this statutory restriction, at 11 C.F.R. § 114.5(a), also are limited to the process of soliciting contributions for a company PAC. Obviously, in the matter at hand, there is no solicitation regarding the company PAC.

While the Commission has added a broader coercion restriction in its "facilitating the making of contributions" regulations at 11 C.F.R. § 114.2(f)(2)(iv), it only prevents coercion "to urge any individual to make a contribution or engage in fundraising activities on behalf of a candidate or political committee."<sup>11</sup> The Romney event was just a campaign appearance. There was no urging of contributions or fundraising activity involved. So, the "facilitation" provision does not apply by its terms either. In sum, even if there had been some showing of coercion in getting mine workers to the event (a proposition respondents firmly deny), there is no anti-coercion rule to apply.

4. *The identifiable company expenses for providing mine workers, their families, and other guests access to a candidate appearance opportunity have been billed to and paid by the Romney campaign.*

After costs could be identified and quantified, the company expenses were aggregated in an invoice that was sent to the Romney campaign. See Exhibit 5. These expenses included, for example, the food services, golf cart rentals, bus rentals, tent rental, and children's entertainment (jugglers etc.). The total was \$57,503.37. The Romney campaign promptly paid the invoice in full.

As noted earlier, there were no costs associated with the time of those non-management mine workers (hourly workers) who attended the event. They were not compensated for that time. As for the management personnel who were invited and attended, their time while at the event, as well as their occasional efforts helping arrange things like food services, rentals, and logistics, fit under the "uncompensated services by volunteers" exception to the "contribution" definition (11 C.F.R. § 100.74). They were excited to volunteer to help, and their scheduling of work tasks to fit around such volunteer activity was fully within their own discretion.<sup>12</sup> The modest time these

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(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee at the time of such solicitation, of his right to refuse to so contribute without any reprisal."

<sup>11</sup> "Examples of facilitating the making of contributions include but are not limited to—

(iv) Using coercion, such as the threat of a detrimental job action, the threat of any other financial reprisal, or the threat of force, to urge any individual to make a contribution or engage in fundraising activities on behalf of a candidate or political committee."

<sup>12</sup> See Exhibit 2, para. 8.



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management personnel put into attending and helping plan and carry out logistics did not trigger the "compensation for personal services" prong of the FEC's "contribution" definition (11 C.F.R. § 100.54(a)) because they were not "expected to work a particular number of hours per period," and there was no corresponding obligation to "make up" any time spent on the event.

By having the Romney campaign pay the various identifiable expenses, the event became a run-of-the-mill Romney campaign event for campaign finance purposes. The campaign was permitted to bring a video crew to record the event for whatever purposes they deemed appropriate. As the Commission knows, it is hardly unusual for a presidential candidate's campaign to make a video recording of such an appearance. That mine workers voluntarily in attendance stood behind the speakers and were captured on video by the Romney campaign is of no legal significance. The complainant's odd suggestion to the contrary should be given short shrift.

### **Conclusion**

We respectfully request the Commission to dismiss the complaint filed by Mr. Rothenberg. The allegations are brought in a partisan manner, and they stem from anonymous, unsworn sources who may simply be disgruntled about a shift change or upset about the company's cooperation in staging a Romney campaign event. There is no evidence that there in fact was any threat of job action or financial reprisal regarding mine workers, that there was any tracking of individuals who did not attend, or that anyone who did not attend suffered any retribution of any sort.

The mine was closed for the midnight shift for the safety of the workers, and the day shift was modified to accommodate the timing of the event, but these were logical steps under the circumstances, and the affected employees were given reasonable opportunity to gain back any work time missed if they chose. By arranging things so that the hourly mine workers attending would be "off the clock," the company actually helped ensure campaign finance legal compliance. And compliance was furthered by working with the Romney campaign to identify relevant expenses and assure that the campaign committee paid them.

Murray Energy Company and its affiliates are proud that they were able to host a presidential candidate appearance. While friction like that evidenced by the complaint in this matter is almost inevitable, we urge the Commission to recognize the compliance efforts made and to dismiss the complaint and spare the company and the agency from the use of further time and resources on an unfounded claim.

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If the Commission believes that any further action is required in this matter, or in either of the other complaints filed almost simultaneously against the Murray Energy group (MUR 6659 and MUR 6661), we request that there be a prompt effort to conciliate such concerns in order to minimize resource usage and get beyond the partisan rancor that generated these matters in the first place. The use of a pre-probable cause conciliation process, or perhaps the Commission's Alternative Dispute Resolution program, would be the recommended approach.

Sincerely,



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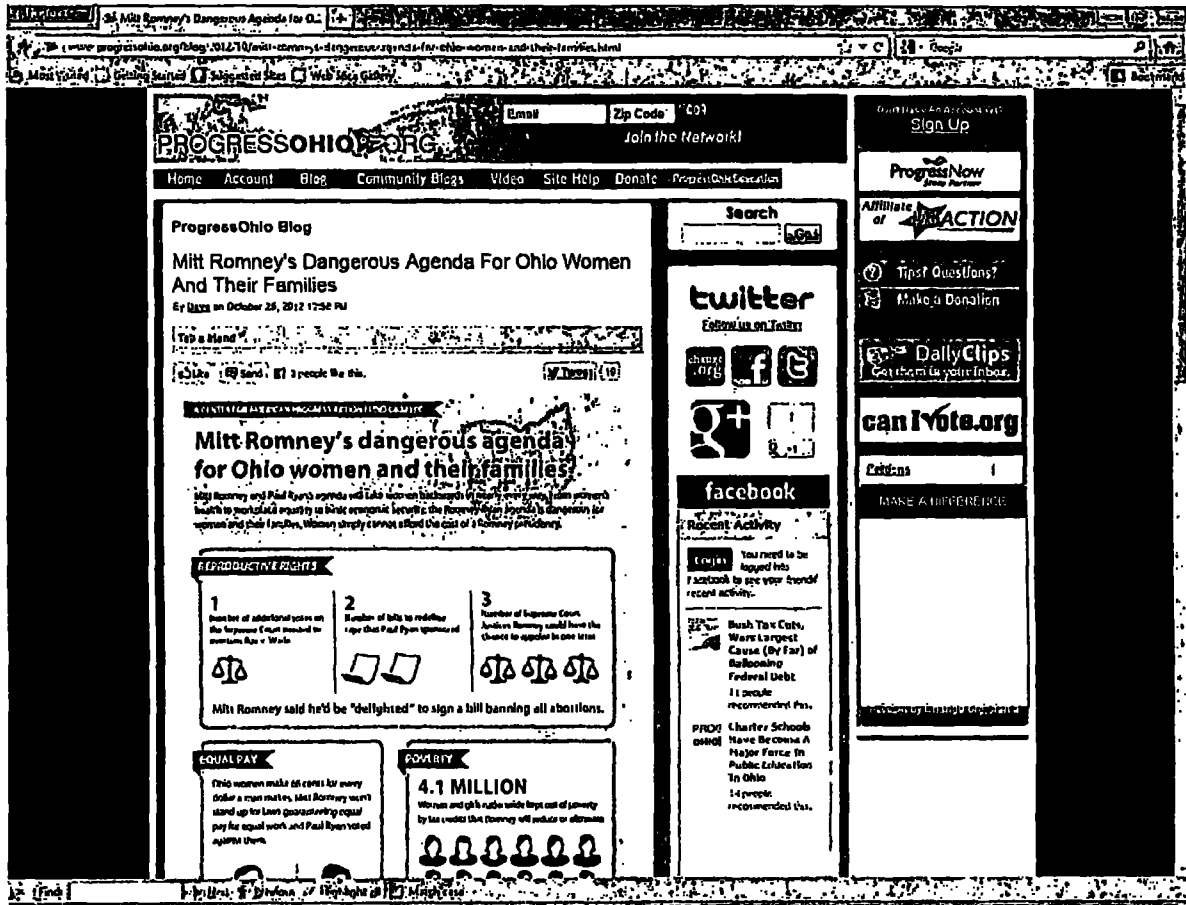
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Attachments

**Exhibit 4**  
**MUR 6651 Response**

**Sample Screen Shots from ProgressOhio Blog**



ProgressOhio.org

Home Account Blog Community Blogs Video Site Help Donate ProgressOhio.org

ProgressOhio Blog

**GOP Leaders Expose Mitt Romney**

By Daz on October 19, 2012 1:11 AM

5 people like this.

Attention Republicans! Here's what your party leaders have to say about your Presidential candidate.

Watch it:

**GOP LEADERS ENDORSE MITT ROMNEY FOR PRESIDENT**

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Charter Schools Have Become A Major Force In Public Education In Ohio

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## ProgressOhio Blog

### The Real Cost Of The Romney-Ryan Plan To Ohioans

Posted on October 14, 2012 9:22 AM

144 Views

Categories: Media Accountability

Like Send 3 people like this.

In Ohio and across our nation, low-income and middle-class Americans would sacrifice for the greater benefit of the wealthiest under the Romney-Ryan plan for the economy, taxes, and health care.

The price tag includes:

- Middle-class Ohioans would pay more in taxes while millionaires pay less. Millionaires in the state would receive an additional \$97,000 in tax breaks under the tax plans of Gov. Romney and Rep. Ryan while middle-class families would pay \$1,800 more in health care taxes and \$1,000 more in taxes on their mortgages.
- Jobs would decline across Ohio. Gov. Romney and Rep. Ryan plan to provide extra tax incentives for corporations to outsource jobs and are pushing policy proposals to cripple the clean energy industry, jeopardizing 125,000 jobs across the state.
- Drastic cuts to federal spending would shrink Ohio's middle class. The state stands to lose more than \$100 billion in federal funding from 2013 through 2022, an average of more than \$10 billion a year, from cuts to schools, law enforcement, highway repairs, job-training programs and more. These cuts would fall predominantly on middle-class and low-income families, especially cuts to education programs that would result in nearly \$100 million in reduced federal support for education in the state in 2013 and 2014 alone.
- Seniors in Ohio would lose health care benefits and pay more. Gov. Romney and Rep. Ryan would force seniors in the state to pay at least \$950 more for their prescription drugs each year. At the same time, the Romney-Ryan plan to turn Medicare into a voucher would cost current seniors at least \$11,000 more out of pocket.
- Women in Ohio would pay more for health care but receive less bang for their buck. Gov. Romney and Rep. Ryan would once again allow insurance companies to charge women more than men while taking away preventive care from at least 1.9 million women in the state.
- Young adults in Ohio would lose access to their families' health insurance. Gov. Romney and Rep. Ryan promise to dismantle Obamacare, which would directly result in 97,000 young adults in Ohio losing the insurance they have today due to the Affordable Care Act.

The Romney-Ryan plan asks the vast majority of Americans to pay more, and then spends this revenue not on balancing the budget but rather on more tax breaks for the richest Americans. Gov. Romney's top direct donor would receive over \$2 billion in direct tax benefits from under the Romney-Ryan plan, while a typical police officer in Columbus makes a little over \$40,000 a year and can't deduct more than \$1,000. There's something seriously wrong with that.

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Charter Schools Have Become A Major Force In Public Education In Ohio is people recommending this

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ProgressOhio Blog

The Red States And The 47%

By Dave on November 8, 2012 9:31 AM

Like (10) Dislike (0) 7 people like this.

State-by-State Probabilities

In the top map, the red states are those that will likely be carried by Mitt Romney on Tuesday.

In the bottom map, the red states are those that will likely be carried by Mitt Romney on Tuesday.

Is there any interesting overlap between the two maps?

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Facebook: Bush Tax Cuts, Wars Largest Cause (by far) of ballooning Federal Debt. 11 people recommended this.

PNOC Ohio: Charter Schools Have Become A Major Force In Public Education In Ohio. 14 people recommended this.

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